



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

**In the Matter of the Request for Opinion
Concerning the Conduct of JEFF MCGOWAN,
City Attorney, City of Fernley,
State of Nevada,**

Request for Opinion No. 08-61C

Subject.

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**EXECUTIVE DIRECTOR'S APPROVAL OF INVESTIGATOR'S REPORT
AND EXECUTIVE DIRECTOR'S RECOMMENDATION**

The Executive Director approves the Investigator's Report but disagrees with the conclusions. The following is the Executive Director's recommendation based on the investigation.

An Ethics Complaint was filed against Fernley City Attorney Jeff McGowan (McGowan) alleging that he used his position to obtain an unwarranted privilege or advantage for himself, in violation of Nevada Revised Statutes (NRS) 281A.400(2). The allegations claim he misused his official position on five occasions to charge on the city credit card his meals and on two occasions to buy gas. The allegations on the gas are that he not only charged the gas to the City of Fernley (City) but was also reimbursed for the gas charges.

This complaint is troubling in that the amount of money McGowan charged the City for his meals and beverages is small. The problem, however, is the pattern of use of public funds for McGowan's personal benefit.

Nevada Revised Statutes and Applicable law.

Pursuant to NRS 281A.400(2), McGowan may not use his position as city attorney to secure an unwarranted privilege or advantage for himself. Under NRS 281A.400(2)(b), "unwarranted" means without adequate reason or justification. The Nevada Supreme Court in the Oscar Goodman case, No. 47165, interpreted the phrase "used his position in government." (Copy of the case is attached.) The court relied on Webster's dictionary to define the word "use." The term means the act or practice of employing something. The court reasoned that other states generally found ethical violations by public officials where the officials bribed or threatened a party or where the officials expended public funds.

The City of Fernley Personnel Manual (Manual) is vague and permits all the city employees almost unlimited travel and meal reimbursements. The only exception is that beverages and personal items must be reimbursed to the City of Fernley (City), if charged on the City credit card. Manual §4.17. (Investigator's Report, Tab E, Exhibit 4).

Recommendation.

The recommendation is that the Panel find just and sufficient cause EXISTS for the Commission to hold a hearing on allegations 1) through 5) listed below. And, the recommendation is that the Panel find just and sufficient cause DOES NOT EXIST for the Commission to hold a hearing on allegations 6) and 7) listed below.

Analysis and Recommendation on each allegation:

Each allegation of a violation is analyzed as follows:

1) Did McGowan violate NRS 281A.400(2) when he allegedly charged his gas in Dayton to the city credit card on May 7, 2008?

On May 7, 2008, McGowan charged a \$3.09 drink, not gas, on his way back to Fernley from conducting city business in Carson City. The Manual in §4.17 states that employees shall reimburse the City for all expenses that are unrelated to performing regular duties, such as reimbursement for personal telephone calls, copies and beverages. (Investigator's Report, Tab E, Exhibit 4).

McGowan did not reimburse the City for this beverage. He violated the Manual and misused public funds to get a beverage he was not entitled to receive at City expense. There is no justification for this charge. Therefore, the recommendation is that the Panel find that just and sufficient cause EXISTS for the Commission to render an opinion on whether McGowan violated NRS 281A.400(2) on May 7, 2008.

2) Did McGowan violate NRS 281A.400(2) when he allegedly charged his dinner at Taco Bell in Fernley to the City credit card on February 13, 2008?

On February 13, 2008 McGowan charged a \$8.93 dinner at 5:24 p.m. in Fernley after returning from an official meeting in Reno. The Manual in §5.16 states that employees will be reimbursed for all reasonable and necessary travel expenses when authorized and directly related to the performance of their assigned duties and which are appropriately authorized. Meals are reimbursed at actual cost (Investigator's Report, Tab E, Exhibit 5).

McGowan charged his dinner to the taxpayers when the workday was over and he arrived in his hometown twenty-four minutes after 5:00 p.m. Dinner in his City is not a reasonable or necessary travel expense. McGowan violated the Manual and misused public funds by obtaining a meal he was not entitled to receive at taxpayer expense. There is no justification for this charge. Therefore, the recommendation is that the Panel find that just and sufficient cause EXISTS for the Commission to render an opinion on whether McGowan violated NRS 281A.400(2) on February 13, 2008.

Allegations contained in Questions 3) and 4) below are similar because they involve charging meals for “staff meetings” on two separate occasions.

3) Did McGowan violate NRS 281A.400(2) when he allegedly charged his lunch at the Silverado Restaurant in Fernley to the City credit card on March 14, 2008?

On March 14, 2008, McGowan charged a \$28 lunch in Fernley at 1:01 p.m. on a day he scheduled a “department and planning” meeting with his secretary. The Manual in §5.16 permits reimbursement for all reasonable and necessary travel expenses related to the performance of their assigned duties and which are appropriately authorized. (Investigator’s Report, Tab E, Exhibit 5).

A staff meeting in town is not related to any travel activity. McGowan should not have charged this lunch to the taxpayers. There is no justification for this charge. He violated the Manual and obtained a meal he was not entitled to receive at taxpayer expense. Therefore, the recommendation is that the Panel find that just and sufficient cause EXISTS for the Commission to render an opinion on whether McGowan violated NRS 281A.400(2) on March 14, 2008.

4) Did McGowan violate NRS 281A.400(2) when he allegedly charged his lunch at the La Fiesta in Fernley to the City credit card on May 6, 2008?

On May 6, 2008, McGowan charged a \$37.42 lunch in Fernley at 12:07 pm on a day he scheduled a “department and planning” meeting with his secretary. The Manual in §5.16 permits reimbursement for all reasonable and necessary travel expenses related to the performance of their assigned duties and which are appropriately authorized. (Investigator’s Report, Tab E, Exhibit 5).

A staff meeting in town is not related to any travel activity. McGowan should not have charged this lunch to the taxpayers. There is no justification for this charge. He violated the Manual and obtained a meal he was not entitled to receive at taxpayer expense. Therefore, the recommendation is that the Panel find that just and sufficient cause EXISTS for the Commission to render an opinion on whether McGowan violated NRS 281A.400(2) on May 6, 2008.

5) Did McGowan violate NRS 281A.400(2) when he allegedly charged his lunch at the Love’s Restaurant in Fernley to the City credit card on April 21, 2008?

On April 21, 2008 McGowan charged a \$7.01 lunch in Fernley at Love’s Restaurant at 12:08 pm on a day he attended a settlement conference in federal court in Reno. The Manual in §5.16 permits reimbursement for travel related to assigned duties.

McGowan could not provide any information on the time of day or length of the settlement conference. (Investigator’s Report, Tab E, Exhibit 5). McGowan traveled that day, but this lunch charged at lunch time appears to be in violation of the Manual and a violation of NRS 281A.400(2) for obtaining a meal he was not entitled to charge to the taxpayers.

Therefore, the recommendation is that the Panel find that just and sufficient cause **EXISTS** for the Commission to render an opinion on whether McGowan violated NRS 281A.400.2 on April 21, 2008.

6) Did McGowan violate NRS 281A.400(2) when he allegedly charged gas in Sparks to the City credit card on September 26, 2007?

On September 26, 2007, McGowan charged \$53.81 at Shell Oil in Sparks after attending an all-day Open Meeting Law seminar in Reno. No evidence was submitted or discovered that McGowan was also personally reimbursed for this credit card charges. The Manual in §5.16 permits reimbursement for travel related to assigned duties. (Investigator's Report, Tab E, Exhibit 5).

Since McGowan was on City business/training out of town, this credit card charge for gas in permitted. Therefore, the recommendation is that the Panel find just and sufficient cause **DOES NOT EXIST** for the Commission to render an opinion on whether McGowan violated NRS 281A.400(2) on September 26, 2007.

7) Did McGowan violate NRS 281A.400(2) when he allegedly charged his lunch at the Peppermill in Reno to the City credit card on April 22, 2008?

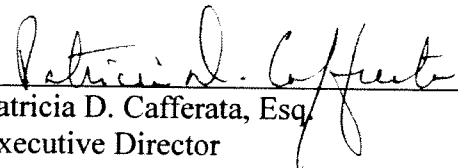
On April 22, 2008, McGowan charged a \$12.87 lunch in Reno on a day he attended an all-day continuing legal education seminar at the Peppermill. The Manual in §5.16 permits reimbursement for travel related to assigned duties. (Investigator's Report, Tab E, Exhibit 5).

Since McGowan was on City business/training out of town, he was entitled to charge his lunch. Therefore, he did not violate the Manual on the lunch charge. Therefore, the recommendation is that the Panel find just and sufficient cause **DOES NOT EXIST** for the Commission to render an opinion on whether McGowan violated NRS 281A.400(2) on April 22, 2008.

Conclusion.

The Recommendation is that the Panel find just and sufficient cause **EXISTS** for the Commission to hold a hearing and render an opinion on the allegations 1) through 5) listed above and find just and sufficient cause **DOES NOT EXIST** on allegations 6) and 7) listed above.

Approval of Investigator's Report and Executive Director's Recommendation by:



Patricia D. Cafferata, Esq.
Executive Director

Dated: 12-17-08

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE NEVADA STATE COMMISSION
ON ETHICS, AN AGENCY OF THE
STATE OF NEVADA,
Appellant,
vs.
OSCAR B. GOODMAN,
Respondent.

No. 47165

FILED

SEP 11 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY Alvarado
DEPUTY CLERK

This is an appeal from a district court order granting judicial review of an ethics commission decision. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Following an administrative hearing, appellant Nevada Commission on Ethics determined that respondent Las Vegas Mayor Oscar Goodman violated NRS 281.481(2)¹ by hosting a cocktail party sponsored by his son's company, iPolitix, at a national mayors' conference. Goodman then filed a petition for judicial review with the district court, arguing that the administrative record did not support the Commission's findings. The district court agreed and this appeal followed.

¹NRS 281.481(2) provides:

A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person.

On appeal, the Commission contends that the district court failed to provide sufficient deference to its findings and that the record supports its determination that Goodman violated NRS 281.481(2). The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition. For the following reasons, we affirm.

Standard of review

When a decision of an administrative body is challenged, our function is identical to that of the district court—we review the evidence presented to the administrative body and ascertain whether that body acted arbitrarily or capriciously, thus abusing its discretion.² Accordingly, we may set aside an agency's final decision if substantial rights of the petitioner have been prejudiced because the decision was, inter alia, affected by error of law or clearly erroneous in view of the reliable, probative and substantial evidence.³ In performing our review, we are limited to the record below, and may not substitute our judgment for that of the agency as to the weight of evidence on questions of fact.⁴

With respect to NRS 281.481, we have recognized that although we “may conduct a de novo review of the Commission's construction . . . the district court was obligated to give deference to the construction afforded by the Commission.”⁵ This is because “[a]n agency

²Gandy v. State ex rel. Div. Investigation, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980).

³NRS 233B.135(3)(e).

⁴Schepcoff v. SIIS, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

⁵State, Comm'n on Ethics v. JMA/Lucchesi, 110 Nev. 1, 6, 866 P.2d 297, 300 (1994).

charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action.”⁶ In addition, “[a]lthough the district court may decide pure legal questions without deference to an agency determination, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence.”⁷ “Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion.”⁸

Substantial evidence does not support the Commission's determination that Mayor Goodman violated NRS 281.481(2)

NRS 281.481(2) prohibits a “public officer” from using “his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person.” Several elements of this statute are not in question and require no further discussion here: (1) Oscar Goodman, as mayor of Las Vegas, is a public officer,⁹ and (2) Mayor Goodman has a commitment in a private capacity to the interests of his son.¹⁰ However, because the parties dispute the

⁶Clark Co. Sch. Dist. v. Local Gov't, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974).

⁷SIIS v. Khweiss, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992).

⁸Schepcoff, 109 Nev. at 325, 849 P.2d at 273.

⁹NRS 281.4365(1).

¹⁰NRS 281.501(8) defines “commitment in a private capacity” under NRS 281.481(2). Pursuant to NRS 281.501(8)(b), a commitment in a
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remaining elements of NRS 281.481(2), we will discuss them in detail below.

Mayor Goodman did not “use his position in government”

Although this court has never addressed the meaning of the term “use” in NRS 281.481(2), Webster’s dictionary defines it as “the act or practice of employing something.”¹¹ In granting Goodman’s petition, the district court applied a similar definition—it defined the verb “to use” as “[t]o put into service or apply for a purpose; employ.”

On appeal, the Commission argues that Goodman “used” his position in government by bringing his son’s attention to the national mayors’ conference. In addition, the Commission contends that Goodman used his position to garner favor for iPolitix by (1) agreeing to host the cocktail party in question, (2) handing out four or five invitations (which included his name and title), and (3) suggesting that attendees pick up an iPolitix informational folder before leaving the party. We disagree. After examining the record, we conclude that the evidence does not sustain a finding that Mayor Goodman “used” his position in government.

Initially, we note that the Commission simply ignores significant evidence in the record. For example, the Commission does not address the fact that the mayors’ conference was actively soliciting new campaign-related technology for presentation at the conference. In

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private capacity means a commitment to a person “[w]ho is related . . . by blood[.]” Because Mayor Goodman’s son is his blood relative, this element is not in dispute.

¹¹Webster’s Ninth New Collegiate Dictionary 1299 (1985).

addition, Goodman's son went through all of the proper procedures to have the conference place an iPolitix event on the conference agenda. There is no evidence that Mayor Goodman aided iPolitix in any way besides telling his son that the conference was seeking technology presentations. Moreover, the record demonstrates that when a scheduling conflict forced the conference organizers to cancel iPolitix's original event, a conference representative, not Goodman, suggested that iPolitix sponsor a cocktail party. In fact, the conference had pre-scheduled Goodman to host a cocktail party at the conference even before he knew about iPolitix's need for a host. Thus, Goodman was not actively involved in the decision to have him host; rather, he merely agreed to host iPolitix's party since he was already going to host one anyway.

Moreover, we conclude that Mayor Goodman did not "use" his position to foster goodwill for iPolitix products before or during the cocktail party. Before the party, iPolitix circulated invitations, which included Mayor Goodman's name. Mayor Goodman personally distributed four or five of the invitations. At the party, Mayor Goodman spoke briefly and encouraged attendees to take a folder providing information on iPolitix's products. In addition, Mayor Goodman mentioned that he loved his son. This type of minimal conduct is not of the same significance that the Commission has generally found to violate NRS 281.481.¹² In

¹²See Commission on Ethics Opinion (COE) No. 00-11 (public official violated NRS 281.481(2) by using government agency's credit card for numerous personal expenses and failing to reimburse the agency in a timely manner); COE No. 98-11 (public official violated NRS 281.481(2) by using her position to hire an employment candidate so that another employment position would become available for her husband); COE No.

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addition, other states have generally found ethical violations by public officials where the official bribes or threatens parties, or where the official expends public funds.¹³ This case does not involve such serious conduct.

After reviewing the record, we conclude that substantial evidence does not support the Commission's determination that Mayor Goodman "used" his position as mayor as that term has been interpreted by the Commission. Accordingly, the district court properly found that Mayor Goodman did not violate NRS 281.481(2).

Mayor Goodman did not "secure or grant unwarranted privileges, preferences, exemptions, or advantages" for his son

Separately, the Commission contends that Mayor Goodman secured or granted unwarranted privileges, preferences, exemptions, or

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94-05 (city councilman violated NRS 281.481(2) by soliciting the participation of companies and individuals who had business or other matters before the council or were likely to have matters considered by the council in a for-profit business venture benefiting only himself). Cf. COE No. 99-08 (public official permitted to race vehicles that are sponsored by local businesses as long as he does not solicit sponsors from industries that he regulates in his official capacity).

¹³See, e.g., N.Y. St. Asphalt Pavement Ass'n v. White, 525 N.Y.S.2d 561, 564 (Sup. Ct. 1988) (finding that a city commissioner secured unwarranted privileges by using his position to compel a company to pay \$150,000 to a non-profit organization); Groener v. Oregon Government Ethics Com'n, 651 P.2d 736, 739-40, 743-44 (Ore. Ct. App. 1982) (concluding that a state senator used his office to obtain unwarranted benefits when he received money in return for his diversion of business from a state agency to a private company).

advantages for his son.¹⁴ As the record makes clear, however, this is not a case in which a public official “pulled strings” in favor of himself or a relative. Rather, Mayor Goodman became aware that the mayors’ conference was soliciting new technology companies to serve as presenters. He relayed this information to his son, who then went through all of the proper procedures to place an iPolitix event on the agenda. After event coordinators cancelled iPolitix’s event and the company decided to hold a cocktail party instead, Mayor Goodman agreed to host the party. Under the circumstances of this case, Mayor Goodman’s conduct does not rise to the level of being “unwarranted.” In fact, the record wholly supports the district court’s conclusion that “the solicitation by [the conference] of ‘cutting edge technology to present at the conference’ (Finding No. 7) was sufficient justification for [Mayor Goodman] to inform his son about the Conference.” Moreover, as noted by the district court, the Commission made “no finding that, beyond providing the desired information, [Mayor Goodman’s] son or iPolitix derived any concrete benefit . . . or expected to do so.” Thus, we conclude that Goodman did not “secure or grant” a benefit in favor of iPolitix or his son. Although the Commission found that “Mayor Goodman created an appearance of impropriety and unwarranted privilege” by encouraging attendees to review iPolitix’s products and material, the district court correctly noted that “the appearance of impropriety . . . is not sufficient to constitute an infraction

¹⁴NRS 281.481(2)(b) defines unwarranted as “without justification or adequate reason.” Although the parties do not specifically raise the issue, we note that there are serious questions regarding the constitutionality of this term, particularly its ambiguity.


of [NRS 281.481(2)].” We therefore conclude that Mayor Goodman’s conduct did not constitute a violation of that statute.

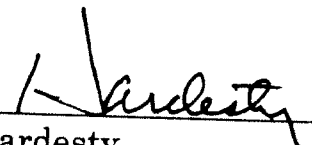
Conclusion

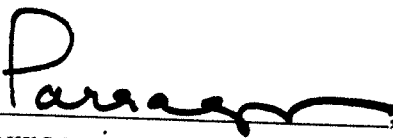
We conclude that substantial evidence does not support the Commission’s determination that Mayor Goodman violated NRS 281.481(2). Accordingly, we

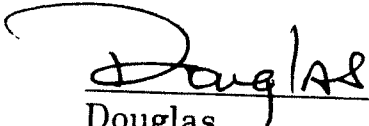
ORDER the judgment of the district court AFFIRMED.

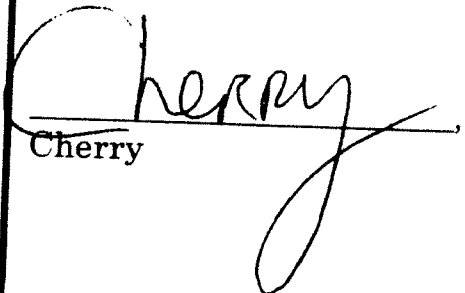

Maupin, C.J.


Gibbons, J.


Hardesty, J.


Parraguirre, J.


Douglas, J.


Cherry, J.


Saitta, J.

cc: Hon. Mark R. Denton, District Judge
Lester H. Berkson, Settlement Judge
Attorney General Catherine Cortez Masto/Carson City
Nevada Commission on Ethics
Goodman Brown & Premsrirut
Eighth District Court Clerk